REPORT OF THE OMBUDSMAN'S OPINION, REASONS THEREFOR, AND RECOMMENDATIONS FOLLOWING HIS INVESTIGATION INTO

THE COMPLAINT OF MR. K.

THE COMPLAINT OF MR. L.

THE COMPLAINT OF MS. M.

THE COMPLAINT OF MRS. H.

THE COMPLAINT OF MRS. J.

JULY, 1988

The Ombudsman | Ontario

DANIEL G. HILL
OMBUDSMAN

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July 26, 1988

The Speaker
Legislative Assembly
Province of Ontario
Queen's Park
Toronto, Ontario

Dear Mr. Speaker:

On this occasion, I wish to present a Special Report containing the results of my investigation into the complaint of Mr. K., Mr. L., Ms. M., Mrs. H., and Mrs. J. This report is submitted pursuant to section 22(4) of the Ombudsman Act.

As you will see, the Ministry of Health, the Attorney General and the Ministry of Education have declined to implement my recommendations in these cases.

As you are aware, such cases are usually reported at the same time each year in my Annual Report. However, when in my opinion special circumstances or urgency exist, I do not wait for the issuing of my Annual Report; I submit a report, such as this, to speed-up the process and hopefully obtain a resolution of the complaints, through the Standing Committee.

The Standing Committee on the Ombudsman is prepared to consider cases reported in this manner on a priority basis.

In my opinion, such expeditious consideration of complaints serves the interests of both the complainants and the governmental agencies involved.

Yours sincerely,

Daniel G. Hill

Daniel G. Hill

Attachment

REPORT OF THE OMBUDSMAN'S OPINION,

REASONS THEREFOR, AND RECOMMENDATIONS

FOLLOWING HIS INVESTIGATION INTO THE COMPLAINT OF

MR. K

Mr. K first contacted one of our Offices in Northern Ontario on June 3, 1987 concerning a complaint against the Ministry of Health. Specifically, Mr. K contended that the Ministry acted unreasonably in restricting eligibility under the Northern Health Travel Grant Program for companion travel grants, to those travelling with patients under the age of 18. The Ministry was notified of our intention to investigate by letter dated July 29, 1987. The file was assigned for investigation to a member of my investigative staff.

Mr. K, a resident of Northern Ontario, was referred to a specialist in a city in Southern Ontario in order to undergo open-heart surgery. Due to his precarious health situation, and upon the advice of his general physician and specialist, Mr. K's wife accompanied him to Southern Ontario for the surgery. Ms. K's application for a companion travel grant was denied, because her husband is over the age of 18.

I wrote to Dr. Martin Barkin, Deputy Minister of the Ministry of Health, on March 14, 1988, pursuant to Section 19(3) of the Ombudsman Act. At that time, I outlined my possible conclusions as follows:

1. The Ministry's restriction of eligibility for a companion travel grant, to those travelling with patients under the age of 18, is in accordance with legislation which is unreasonable and improperly discriminatory.

2. The Ministry's actions appear to have been contrary to law in that they may violate Section 15 of the Charter of Rights and Freedoms.

I also tentatively recommended that the Ministry should amend Ontario Regulation 596/85 in order to remove all age restrictions pertaining to the provision of companion travel grants under the Northern Health Travel Grant Program.

During the course of the investigation, representatives of my Office were advised by senior officials of the program that it had been designed so as to obviate the need for discretion on the part of administrators. It was suggested that the Ministry would be concerned that expanding the current eligibility requirements with respect to companion travel grants could place physicians in the position of having to make decisions with respect to who might be eligible for these grants on the basis of the patient's condition, potentially rendering the physician legally liable in the case of mishap. It was further suggested that, because the program deals with access to specialist services, one would

frequently be dealing with complex and/or serious medical conditions, and that it might therefore be difficult for a physician to deny companion travel grants for any patient. This was said to be exacerbated by the fact that in smaller northern communities the physician is often a friend of the family.

While I am not entirely unsympathetic to the Ministry's view that any changes to the program necessitating the exercise of discretion could be problematic, I am guided by the stated goals of the program, which appear to be an attempt to offset the costs of medically necessary travel to specialists for those residing in Northern Ontario. I am of the opinion that those who must travel with patients over the age of 18 should be entitled to receive the grant and, in fact, denying assistance in those cases seems to me to mitigate against the objectives of the program.

Section 5 of Regulation 596/85 reads as follows:

> Where a patient under 18 years of age is accompanied by an adult who is a relative or guardian of the patient and the patient is given a grant under Section 3 or 6 and the transportation of the patient is by air, rail or bus, a grant may be provided to the adult who accompanies a patient in the same amount as is provided to the patient.

On its face, this Section appears to violate Section 15 of the Charter of Rights and Freedoms, by denying the complainants equal benefit of the law because of age. It would seem that eligibility should be determined on grounds other than age.

Mindful of the Ministry's concerns with respect to minimizing the exercise of discretion, I suggest that it may be possible to develop a list of specific disabilities and/or medical procedures which would be identified as entitling those applying for companion travel grants to accompany patients over 18. However, because it would not be feasible to draw up an exhaustive list, it would seem advisable to amend the Regulation, so that cases which do not fall within the stated eligibility requirements would be reviewed in order to determine whether a companion travel grant would be granted on a discretionary basis. An appropriately re-drafted Regulation would also satisfy the equality requirements of the Charter.

I have now reviewed Dr. Barkin's letter of May 20, 1988 in response to my letter written pursuant to Section 19(3) of the Ombudsman Act. Dr. Barkin refers to a Ministry document entitled "Northern Transportation Subsidy Program And Access to Health Services", unsigned and undated, but apparently part of the package comprising the Cabinet's submission with respect to this program. I had referred to this document in my letter, as there is discussion of the issue of patient accompaniment. Therein, it is observed that patients may wish to be accompanied, or may require accompaniment, for a number of reasons, including age, medical condition, disorientation, due to either disease or treatment, or because of the need for moral support. It is stated that the only

relatively clearly defined category is accompaniment for children and that, therefore, the proposals should include a grant structured for parents or guardians travelling with a patient under the age of 18 years. However, the Ministry report notes that hospitals may be in a position to determine when it is appropriate for a patient to be accompanied. It is proposed that in the second year of operation of the program, hospitals be allocated an additional 15% of the previous year's expenditure to administer, on a discretionary basis, grants for the accompaniment of patients over 18 years of age. Dr. Barkin observes that the paper recognized the difficulties inherent in identifying the patients who might need accompaniment because of the wide variation in medical circumstances that could arise. It is also noted that involving hospitals in the way suggested was not pursued. Dr. Barkin notes that the Northern Health Travel Grant Program "continues to be under review, including the manner in which companion grants are administered."

While I can appreciate the fact that the program is still under active review, I cannot help but note that Dr. Barkin has not addressed my tentative conclusions or recommendation. Specifically, the Ministry has not responded to my statement that restriction of eligibility for companion travel grants on the basis of age appears to be in accordance with legislation which is unreasonable and improperly discriminatory, and apparently contrary to law, in that the Section may violate Section 15 of the Charter of Rights and Freedoms.

Under the circumstances, my views on this matter remain unchanged. Therefore, pursuant to Section 22(1)(a) and (b), I conclude:

1. The Ministry's restriction of eligibility for a companion travel grant under the Northern Health Travel Grant Program, to those travelling with patients under the age of 18, is in accordance with legislation which is unreasonable and improperly discriminatory.

2. The Ministry's actions appear to have been contrary to law in that they appear to violate Section 15 of the Charter of Rights and Freedoms.

Consequently, pursuant to Section 22(3)(d) and (e), I recommend that the Ministry should amend Ontario Regulation 596/85 in order to remove all age restrictions pertaining to the provision of companion travel grants under the Northern Health Travel Grant Program.

This report was sent to the Deputy Minister of Health on June 29, 1988. To date, a response had not been received. I believe the Ministry has had a reasonable amount of time in which to respond and that any further delay would be unfair to Mr. K. I therefore sent a copy of the report to the Premier on July 21, 1988. Mr. K was notified of the results of my investigation and the file was then closed.

REPORT OF THE OMBUDSMAN'S OPINION,

REASONS THEREFOR, AND RECOMMENDATIONS

FOLLOWING HIS INVESTIGATION INTO THE COMPLAINT OF

MR. L

Mr. L first contacted one of our Offices in Northern Ontario on August 24, 1987, concerning a complaint against the Ministry of Health. Specifically, Mr. L contended that the Ministry acted unreasonably in restricting eligibility under the Northern Health Travel Grant Program for companion travel grants, to those travelling with patients under the age of 18. The Ministry was notified of our intention to investigate by letter dated October 15, 1987. The file was assigned for investigation to a member of my investigative staff.

Mr. and Ms. L are senior citizens living within limited means. Ms. L, who is legally blind, was referred to a specialist in a major centre in Southern Ontario for laser treatment in connection with her diabetic retinopathy. She has two statements from physicians indicating her inability to travel alone. Mr. L's application for a companion travel grant was denied because Ms. L is over the age of 18.

I wrote to Dr. Martin Barkin, Deputy Minister of the Ministry of Health, on March 14, 1988, pursuant to Section 19(3) of the Ombudsman Act. At that time, I outlined my possible conclusions as follows:

1. The Ministry's restriction of eligibility for a companion travel grant, to those travelling with patients under the age of 18, is in accordance with legislation which is unreasonable and improperly discriminatory.

2. The Ministry's actions appear to have been contrary to law in that they may violate Section 15 of the Charter of Rights and Freedoms.

I also tentatively recommended that the Ministry should amend Ontario Regulation 596/85 in order to remove all age restrictions pertaining to the provision of companion travel grants under the Northern Health Travel Grant Program.

During the course of the investigation, representatives of my Office were advised by senior officials of the program that it had been designed so as to obviate the need for discretion on the part of administrators. It was suggested that the Ministry would be concerned that expanding the current eligibility requirements with respect to companion travel grants could place physicians in the position of having to make decisions with respect to who might be eligible for these grants on the basis of the patient's condition, potentially rendering the physician legally liable in the case of mishap. It was further suggested that, because the program deals with access to specialist services, one would

frequently be dealing with complex and/or serious medical conditions, and that it might therefore be difficult for a physician to deny companion travel grants for any patient. This was said to be exacerbated by the fact that, in smaller northern communities, the physician is often a friend of the family.

While I am not entirely unsympathetic to the Ministry's view that any changes to the program necessitating the exercise of discretion could be problematic, I am guided by the stated goals of the program, which appear to be an attempt to offset the costs of medically necessary travel to specialists for those residing in Northern Ontario. I am of the opinion that those who must travel with patients over the age of 18 should be entitled to receive the grant and, in fact, denying assistance in those cases seems to me to mitigate against the objectives of the program.

Section 5 of Regulation 596/85 reads as follows:

> Where a patient under 18 years of age is accompanied by an adult who is a relative or guardian of the patient and the patient is given a grant under Section 3 or 6 and the transportation of the patient is by air, rail or bus, a grant may be provided to the adult who accompanies a patient in the same amount as is provided to the patient.

On its face, this Section appears to violate Section 15 of the Charter of Rights and Freedoms, by denying the complainants equal benefit of the law because of age. It would seem that eligibility should be determined on grounds other than age.

Mindful of the Ministry's concerns with respect to minimizing the exercise of discretion, I suggest that it may be possible to develop a list of specific disabilities and/or medical procedures which would be identified as entitling those applying for companion travel grants to accompany patients over 18. However, because it would not be feasible to draw up an exhaustive list, it would seem advisable to amend the Regulation such that cases which do not fall within the stated eligibility requirements, would be reviewed in order to determine whether a companion travel grant would be granted on a discretionary basis. An appropriately re-drafted Regulation would also satisfy the equality requirements of the Charter.

I have now reviewed Dr. Barkin's letter of May 20, 1988 in response to my letter written pursuant to Section 19(3) of the Ombudsman Act. Dr. Barkin refers to a Ministry document entitled "Northern Transportation Subsidy Program And Access to Health Services", unsigned and undated, but apparently part of the package comprising the Cabinet's submission with respect to this program. I had referred to this document in my letter, as there is discussion of the issue of patient accompaniment. Therein, it is observed that patients may wish to be accompanied, or may require accompaniment, for a number of reasons, including age, medical condition, disorientation, due to either disease or treatment, or because of the need for moral support. It is stated that the only

relatively clearly defined category is accompaniment for children and, that therefore, the proposals should include a grant structured for parents or guardians travelling with a patient under the age of 18 years of age. However, the Ministry report notes that hospitals may be in a position to determine when it is appropriate for a patient to be accompanied. It is proposed that in the second year of operation of the program, hospitals be allocated an additional 15% of the previous year's expenditure to administer, on a discretionary basis, grants for the accompaniment of patients over 18 years of age. Dr. Barkin observes that the paper recognized the difficulties inherent in identifying the patients who might need accompaniment because of the wide variation in medical circumstances that could arise. It is also noted that involving hospitals in the way suggested was not pursued. Dr. Barkin notes that the Northern Health Travel Grant Program "continues to be under review, including the manner in which companion grants are administered".

While I can appreciate the fact that the program is still under active review, I cannot help but note that Dr. Barkin has not addressed my tentative conclusions or recommendation. Specifically, the Ministry has not responded to my statement that restriction of eligibility for companion travel grants on the basis of age appears to be in accordance with legislation which is unreasonable and improperly discriminatory, and apparently contrary to law, in that the Section may violate Section 15 of the Charter of Rights and Freedoms.

Under the circumstances, my views on this matter remain unchanged. Therefore, pursuant to Section 22(1)(a) and (b), I conclude:

1. The Ministry's restriction of eligibility for a companion travel grant under the Northern Health Travel Grant Program, to those travelling with patients under the age of 18, is in accordance with legislation which is unreasonable and improperly discriminatory.

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Consequently, pursuant to Section 22(3)(d) and (e), I recommend that the Ministry should amend Ontario Regulation 596/85 in order to remove all age restrictions pertaining to the provision of companion travel grants under the Northern Health Travel Grant Program.

This report was sent to the Deputy Minister of Health on June 30, 1988. To date, a response had not been received. I believe the Ministry has had a reasonable amount of time in which to respond and that any further delay would be unfair to Mr. L. I therefore sent a copy of the report to the Premier on July 21, 1988. Mr. L was notified of the results of my investigation and the file was then closed.

REPORT OF THE OMBUDSMAN'S OPINION,

REASONS THEREFOR, AND RECOMMENDATIONS

FOLLOWING HIS INVESTIGATION INTO THE COMPLAINT OF

MS. M

Ms. M first contacted one of our Northern Ontario Offices on July 8, 1985, concerning a complaint against the Ministry of Health. Specifically, Ms. M contended that the Ministry acted unreasonably in restricting eligibility under the Northern Health Travel Grant Program for companion travel grants to those travelling with patients under the age of 18. The Ministry was notified of our intention to investigate by letter dated April 27, 1987. The file was assigned for investigation to members of my investigative staff.

Since age 14, Ms. M has travelled from her home in Northern Ontario to a major centre in Southern Ontario and to a city in another province once a year, in order to see a specialist with respect to problems in both hips. She has one hip replacement and the other hip will soon require the same procedure. Ms. M 's parents, who have accompanied her on each occasion, have been denied companion travel grants, because Ms. M is over the age of 18.

I wrote to Dr. Martin Barkin, Deputy Minister of the Ministry of Health on March 14, 1988, pursuant to Section 19(3) of the Ombudsman Act. At that time, I outlined my possible conclusions as follows:

1. The Ministry's restriction of eligibility for a companion travel grant, to those travelling with patients under the age of 18, is in accordance with legislation which is unreasonable and improperly discriminatory.

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because the program deals with access to specialist services, one would frequently be dealing with complex and/or serious medical conditions, and that it might therefore be difficult for a physician to deny companion travel grants for any patient. This was said to be exacerbated by the fact that in smaller northern communities, the physician is often a friend of the family.

While I am not entirely unsympathetic to the Ministry's view that any changes to the program necessitating the exercise of discretion could be problematic, I am guided by the stated goals of the program, which appear to be an attempt to offset the costs of medically necessary travel to specialists for those residing in Northern Ontario. I am of the opinion that those who must travel with patients over the age of 18 should be entitled to receive the grant and, in fact, denying assistance in those cases seems to me to mitigate against the objectives of the program.

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On its face, this Section appears to violate Section 15 of the Charter of Rights and Freedoms, by denying the complainants equal benefit of the law because of age. It would seem that eligibility should be determined on grounds other than age.

Mindful of the Ministry's concerns with respect to minimizing the exercise of discretion, I suggest that it may be possible to develop a list of specific disabilities and/or medical procedures which would be identified as entitling those applying for companion travel grants to accompany patients over 18. However, because it would not be feasible to draw up an exhaustive list, it would seem advisable to amend the Regulation such that cases which do not fall within the stated eligibility requirements would be reviewed in order to determine whether a companion travel grant would be granted on a discretionary basis. An appropriately re-drafted Regulation would also satisfy the equality requirements of the Charter.

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because of the need for moral support. It is stated that the only relatively clearly defined category is accompaniment for children and that, therefore, the proposals should include a grant structured for parents or guardians travelling with a patient under the age of 18 years of age. However, the Ministry report notes that hospitals may be in a position to determine when it is appropriate for a patient to be accompanied. It is proposed that in the second year of operation of the program, hospitals be allocated an additional 15% of the previous year's expenditure to administer, on a discretionary basis, grants for the accompaniment of patients over 18 years of age. Dr. Barkin observes that the paper recognized the difficulties inherent in identifying the patients who might need accompaniment because of the wide variation in medical circumstances that could arise. It is also noted that involving hospitals in the way suggested was not pursued. Dr. Barkin notes that the Northern Health Travel Grant Program "continues to be under review, including the manner in which companion grants are administered".

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This report was sent to the Deputy Minister of Health on June 30, 1988. To date, a response had not been received. I believe the Ministry has had a reasonable amount of time in which to respond and that any further delay would be unfair to Ms. M. I therefore sent a copy of the report to the Premier on July 21, 1988. Ms. M was notified of the results of my investigation and the file was then closed.

REPORT OF THE OMBUDSMAN'S OPINION,

REASONS THEREFOR AND RECOMMENDATIONS

FOLLOWING HIS INVESTIGATION INTO THE COMPLAINT OF

MRS. H

Mrs. H's complaint was first brought to my attention through her Member of Provincial Parliament, by letter dated June 9, 1986. Mrs. H subsequently set out her complaints to me in writing by letter dated June 21, 1986. The complaint under investigation was that, as a widow of a former contributor to the Teachers' Superannuation Fund (TSF), Mrs. H has been denied a dependant's allowance (now called a survivor allowance). Under the terms of the applicable legislation, the former Teachers' Superannuation Act, R.S.O. 1980, c. 494, s. 36(2) (TSA), a dependant's allowance was not payable to the surviving spouse of a deceased pensioner if they were married after the date of the pensioner's last day of employment in education. This provision is also contained in the current Teachers' Superannuation Act, 1983, S.O. 1983 c. 84, s. 26(3) (TSA, 1983). The former TSA applies in respect of allowances for teachers who retired before September 1, 1984.

Mrs. H is the widow of Mr. H who paid into the Teachers' Superannuation Fund from 1928 until 1972. Mr. and Mrs. H married in 1982, ten years after Mr. H retired from employment. Mr. H had been in receipt of a pension in the sum of approximately $2,000 per month. After Mr. H's death on August 8, 1985, Mrs. H received written notification from the Teachers' Superannuation Commission that she was not entitled to receive a dependant's allowance with respect to her husband's pension, due to the fact that her marriage had taken place after his date of retirement in 1972.

Mrs. H advised the Commission that both she and her late husband were under the impression that this was not the case; she further indicated that they had relied upon a letter written in 1974 from the Teachers' Superannuation Commission to Mr. H wherein the Commission stated "upon your death your wife will be entitled to receive a dependant's allowance from this Fund that will be paid until her remarriage or death, whichever comes first. This pension will be valued at approximately one-half of the pension you have been receiving."

The Commission explained to Mrs. H that at the time this letter was written, the Commission had on its file her late husband's application for pension wherein he had indicated his wife as "Ms. A" and had listed her as his dependant, further noting that his marriage to Ms. A took place on June 26, 1968. As this marriage took place prior to Mr. H's date of retirement in 1972, the Commission correctly advised Mr. H in its letter of December 18, 1975 that his (then) wife would be entitled to a dependant's allowance. The Commission's letter did not discuss the possibility that Mr. H's wife in 1975 could predecease him or

that Mr. H would enter into another marriage, and thus it did not advise Mr. H that his new wife would not be entitled to a dependant's allowance upon his death, due to the fact that the marriage took place after his date of retirement.

After making informal inquiries with the Commission concerning the impact of the then proposed Pensions Benefit Act, 1987 (PBA), on August 1, 1986 my Office notified the Commission of my intent to investigate Mrs. H's concerns. Also, on August 13, 1986 I advised the then Superintendent of Pensions with the Pension Commission of Ontario that I had recently received a number of letters of concern similar to Mrs. H's complaint and I queried whether or not the provisions of the TSA 1983, section 26(3), in particular, had received consideration by the Pension Commission of Ontario upon its own motion or by virtue of submissions received from interested parties concerning the new legislation. Specifically, I asked whether or not the then proposed PBA would alleviate the hardship created by the application of section 26(3) of the TSA 1983.

By letter dated July 17, 1986, in response to our informal inquiries, the Teachers' Superannuation Commission advised that Mr. H's surviving spouse was denied a survivor allowance as there was no provision in the legislation to allow the payment of such an allowance where the marriage occurred after the retirement of the contributor. Further information with respect to the Commission's review of the proposed PBA was received by letters dated August 18, 1986 and September 4, 1986.

By letter dated September 10, 1986 Mr. B, Senior Pension Officer with the Pension Commission of Ontario, advised that the then proposed PBA would not require pension plans to provide survivor pensions where the marriage occurs after the member's retirement date. The Pension Commission further noted that at the time of a member's termination, retirement or death, his/her entitlements are valued and monies commence to be paid from the plan. Mr. B stated that "the value of a pension would be difficult to calculate and to properly fund if it was necessary to take into consideration all the possible events which could occur after the member has ceased employment with the plan sponsor." Mr. B also noted that in addition, the TSA 1983, unlike most other plans, provides under section 32 that a pensioner can elect to provide a survivor allowance to a spouse where marriage takes place after retirement.

The TSA 1983, s. 26 provides as follows:

> 26(1) The spouse of a person who dies while receiving an allowance under this Act is entitled to an annual survivor allowance during the spouse's lifetime ....
>
> 26(3) Subsections (1) and (2) do not apply to the surviving spouse of a deceased person if they became spouses after the date of the deceased person's last day of employment in education.

Subsection 36(2) of the former TSA provides a similar exclusion as subsection 26(3), to prohibit a surviving spouse from receiving a survivor's allowance when the marriage occurred after the contributor's retirement date.

Apparently drafted in order to relieve the hardship of the above-noted provision, section 32 of the TSA, 1983 enables a teacher, who is in receipt of a pension and who marries after retirement, to direct the Commission to pay a survivor allowance to his or her spouse. A direction to the Fund must be given within 90 days of the teacher's marriage or, if this time period is missed, the Commission may accept a late direction if it is satisfied that the person making the direction is in good health, having regard to the person's age. Section 32(4) provides that the pension which would otherwise be payable to the retired teacher be actuarially reduced to allow for the survivor allowance. Section 32 provides as follows:

> 32(1) A person who is receiving or has a vested interest in a superannuation allowance under this Act and who becomes a spouse after ceasing to be employed in education may direct the Commission to pay a survivor allowance related to the person's allowance in the amount of 50 per cent, 55 per cent, 60 per cent, 65 per cent, 70 per cent or 75 per cent of the allowance paid or that would otherwise be payable to the person on the first day of the month next following the month in which the person becomes a spouse....
>
> (4) Subject to subsection (5), where a direction mentioned in subsection (1) is delivered in accordance with subsection (2) or is accepted in accordance with subsection (3), the amount of the allowance payable to the person shall be actuarially reduced by the actuary of the Commission in a manner approved by the Commission to allow for the survivor allowance in accordance with the direction, and the survivor allowance shall be paid to the surviving spouse in the percentage specified in the direction.
>
> (5) A survivor allowance under this section does not become payable until there is no person eligible to receive a survivor allowance as a child of the person in receipt of or with a vested interest in the superannuation allowance to which the survivor allowance relates.

However, section 76(1) of the TSA, 1983 provides that where a person has retired before September 1, 1984, his or her pension will continue to be governed by the legislation as it existed before this Act was proclaimed in force. Mr. H retired before September 1, 1984 and the former TSA did not contain a provision equivalent to section 32 of the 1983 Act. There was thus no method available by which Mr. H could ensure that his new wife would receive any allowance if he predeceased her.

Section 15(1) of the Charter of Rights and Freedoms provides for equality rights as follows:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Section 1 of the Charter provides that:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

As a result of this investigation, it was my view that the impugned provisions of the TSA and the TSA, 1983 infringe section 15(1) of the Charter. On February 26, 1988, I advised the following governmental organizations of my possible conclusion and recommendations, in accordance with section 19(3) of the Ombudsman Act: Teachers' Superannuation Commission, Minister of Education, Attorney General, Public Sector Pensions Advisory Board and the Pension Commission of Ontario.

It was my possible conclusion that the decision of the Teachers' Superannuation Commission to deny a survivor's allowance to Mrs. H because she was not a spouse at the time of her late husband's retirement, pursuant to section 36(2) of the Teachers' Superannuation Act, R.S.O. 1980, c. 494, appeared to be contrary to law, specifically the Charter of Rights and Freedoms, section 15(1), and thus was of no force or effect. Similarly, section 26(3) of the Teachers' Superannuation Act,1983, S.O. 1983, c. 84 appeared to be contrary to law, specifically the Charter of Rights and Freedoms, section 15(1), and thus of no force or effect. My first possible recommendation was that the Attorney General, in conjunction with the Minister of Education, take appropriate steps to amend the Teachers' Superannuation Act, R.S.O. 1980, c. 494 and the Teachers' Superannuation Act, 1983, S.O. 1983, c. 84 to be in compliance with section 15(1) of the Charter of Rights and Freedoms, effective April 17, 1985. It was my second possible recommendation that once the appropriate amendments have been made, the Teachers' Superannuation Commission issue a dependant's allowance to Mrs. H in accordance with section 36(1) of the Teachers' Superannuation Act, R.S.O. 1980, c. 494, effective September, 1985. My position was based on the following information:

Firstly, it was necessary to determine whether the impugned provisions could be considered under section 15(1) of the Charter. It seemed to me that Mrs. H was being discriminated against on the basis of her marital status, since she was not Mr. H's spouse as at the date of a certain event, namely his retirement. Although section 15(1) lists nine particular grounds of discrimination, marital status is not an enumerated

ground; however, the courts have adjudicated cases dealing with other grounds including marital status.

In Re MacVicar and Superintendent of Family and Child Services (1987) 34 D.L.R. (4th) 488, the British Columbia Supreme Court considered marital status to be covered by section 15(1) on the basis that the list is not exhaustive and even if a non-enumerated ground must be similar to those listed, marital status satisfies that requirement.

Marital status is a prohibited ground of discrimination in the Ontario Human Rights Code, in response to a number of concerns over denials of services, or employment opportunities. Most cases have been concerned with the recognition of a common-law relationship.

Additionally, the Parliamentary Committee on Equality Rights stated in its October, 1985 Report, "Equality for All" at page 34:

> We believe that section 15 of the Charter should be read against the historical background of the treatment and law of married women and the recognition nationally and internationally that marital and, in many cases, family status deserve protection by the state. Accordingly, while section 15 does not specifically prohibit discrimination on the basis of marital or family status, we believe that the ground can be properly read into the open-ended language of the section. In other words, marital or family status is implicitly covered by section 15.

In a recent Federal Court of Appeal case, Re Headley et al and the Public Service Commission Appeal Board (1987) 35 D.L.R. (4th) 568, Mr. Justice MacGuigan stated in his reasons that the word "discrimination" constitutes an internal modifier of the guarantee of equality. Where a pejorative distinction is not based on an enumerated ground, a complainant must prove that discrimination results.

Thus, in order to be within the ambit of the subsection, it is necessary for the complainant to show discrimination as a result of the impugned legislation. In Re Blainey and Ontario Hockey Association et all, (1986), 54 O.R. (2d) 513, the Ontario Court of Appeal found that when read as a whole, this subsection constitutes a compendious expression of a positive right to equality in both the substance and administration of the law. It does not, however, require that every person in every instance be treated in precisely the same manner. Its purpose is to require that those who are similarly situated be similarly treated, and the interests of true equality may require differentiation in treatment. Other courts have similarly held that not every difference or distinction is sufficient to give rise to a breach of section 15(1). Some content must be given to the words "without discrimination".

To do so, the Supreme Court of Canada in R. v. Big M Drug Mart Limited, (1985) 18 D.L.R. (4th) 321 has stated that the purpose of a statutory provision must be determined. In the MacVicar case, the court asked, having regard to the purpose of the legislation, whether the

impugned provision creates an inequality or distinction amongst similarly situated persons. If so, then is the distinction unreasonable and unfair, that is, "discriminatory"?

The provisions of the Teachers' Superannuation Act, both R.S.O. 1980 and S.O. 1983, as well as most public-sector plans relating to survivor benefits, originally reflected a desire to provide income security or at least financial assistance to a widow at the time of her husband's death, to be discontinued on remarriage. Changing social norms, as well as attempted compliance by governments to section 15 of the Charter, have resulted in survivor benefits being available to either spouse and most recently, a continuation of benefits despite remarriage.

It would seem that survivor benefits are meant to continue to provide a level of income to a surviving spouse. The question to be asked is whether the provision of survivor benefits should be dependent upon one's marital status and even more specifically, the timing of such status vis-a-vis the time of a specified event, in this case, retirement.

It was my position that the facts of Mrs. H's case seemed to indicate that her complaint could be viewed as one of discrimination based on her marital status. The TSC advised that she is not entitled to a dependant's allowance because she was not a spouse at the time of Mr. H's retirement. Mr. H retired on June 30, 1972. If the present Mrs. H had married him on that day or before, she would be eligible for a survivor allowance after Mr. H's death. Since she became his spouse after this date, the Commission claims she is disentitled from receiving a survivor allowance.

It appeared to me that although Mrs. H is a surviving spouse, she is not being treated similarly to other surviving spouses merely because she became Mr. H's spouse after he had completed his career in education. It is important to note that neither a contributor nor the employer contributes a greater amount into a plan based on marital status. As previously stated, if Mr. H had married Mrs. H one day before retiring, presumably Mrs. H would be considered eligible for survivor benefits under section 36(2) of the former Act or section 26(3) of the 1983 Act. These sections, on the face of each Act, clearly treat dissimilarly different classes of individuals, although they are similarly situated relative to the purpose of the legislation. I have also considered whether the distinction made between surviving spouses has a pejorative impact.

Until quite recently, marital status was used to disentitle a survivor from his or her (surviving) spouse's allowance upon remarriage. Many groups, including the Canadian Human Rights Commission and the Federal Superannuates National Association, urged the federal government to repeal such provisions so that entitlement would not be affected by changes in marital status. It was noted by the latter Association that "superannuation is neither welfare nor charity and the benefits provided should reflect that it is a contributory pension plan." The Canada Pension Plan (CPP) was so amended in 1986, and in Ontario the recently proclaimed Pension Benefits Act, 1987 provides in section 48 that

remarriage does not disentitle a spouse to payment of a pension. In fact, the Teachers' Superannuation Act, 1983 effectively eliminated the remarriage restriction by virtue of section 26, which extends entitlement to "during the spouse's lifetime."

While remarriage of the surviving spouse is no longer a bar to entitlement, remarriage of the contributor after retirement continues to defeat applications for survivor benefits. In my view, recognition of the possibility of the contributor's remarriage ought also to be considered, especially in light of early retirements which are being encouraged by employers, employees and pension plans alike. Not to do so is, in my opinion, unfair and unreasonable.

In its October, 1985 Report referred to above, the Federal Parliamentary Committee on Equality Rights recommended "the repeal of provisions in federal superannuation plans that disentitle a surviving spouse to benefits where the marriage took place after the contributing spouse retired or reached age 60."

The federal government responded that it "would not want to commit itself to such a change as it would involve a significant increase in employee and employer costs. Providing benefits as recommended is virtually unknown under private pension plans. However, the public service pension reform study will address the possibility of changes to accommodate spouses who marry contributors aged 60 or more or who were already retired."

It is also of interest to note that a suggestion has been made that proof of actual financial dependence upon the deceased contributor should be the primary qualification for a survivor's benefit and not marital status, or timing thereof of the individuals involved. A. Anne McLellan, in a chapter contained in "Equality Rights and the Canadian Charter of Rights and Freedoms", (Bayefsky and Eberts, eds.), comments that:

> Basing qualifications for the [CPP Survivor's] benefit upon marital status denies, if not the existence, the importance of alternative forms of dependency relationships and their resultant expectations. Hence, if the federal Parliament's objective or purpose in enacting such provisions was to assist financially dependent survivors, the means they have chosen to achieve this laudable purpose are under-inclusive because many situations of actual dependency are excluded from the ambit of the statute.

Legal research was undertaken by my staff to reveal whether any of the federal and Ontario public-sector superannuation plans have eliminated provisions which would disentitle a surviving spouse to benefits where the marriage took place after the contributing spouse retired.

Interestingly enough, the Legislative Assembly Retirement Allowances Act (LARAA), formerly contained a provision prohibiting a

surviving spouse from receiving a spouse's allowance: (a) if the spouse married the person after he or she attained age 65 and the person died within one year of the marriage; (b) if the spouse married the person after he or she was in receipt of the allowance; or (c) after the spouse remarried. However, these provisions were eliminated in 1984, so that now section 11(1) of this Act reads: "where a former member who is receiving an allowance dies leaving a spouse, the spouse shall be paid during his or her lifetime an allowance equal to ...." The above-noted restrictions no longer apply. Also, a provision such as that found in section 32 of the TSA, 1983 was not added, nor does Hansard reveal any discussion about this amendment.

A search of other Ontario public-sector pension plans revealed provisions similar to that of the TSA and TSA, 1983. Therefore, unlike the case in any other public-sector pension plan in Ontario, the restriction against entitlement to a survivor allowance for post-retirement spouses has been removed from the plan established for the members of the Legislative Assembly.

A review of federal and other provincial legislative provisions was also undertaken. Federally, the spousal allowance payable under the Old Age Security Act, R.S.C. 1970, c. O-6, which is only payable to those between the ages of 60 and 65, is not restrictive as to the timing of a post-retirement marriage but only as to the length of marriage. The Pension Act, R.S.C. 1970, c. P-7 provides that a spousal allowance is payable where a pensioner was in receipt of an allowance if the marriage took place before the pension was granted, or, after the pension was granted and the couple was married at least one year. The federal Public Service Superannuation Act, R.S.C. 1970, c. P-36 prohibits a spousal allowance, if the parties were married after entitlement to an annuity or annual allowance, unless after the marriage a spouse became or continued to be a contributor. The War Veterans Allowance Act, R.S.C. 1970, c. W-5 is silent as to the timing of a marriage but states that a surviving spouse can receive an allowance.

Several statutes of British Columbia provide for the payment of a spousal allowance regardless of the timing of a marriage. Somewhat similar to Ontario's LARAA, the Legislative Assembly Allowances and Pension Act, S.B.C. 1980, c. 228 provides that the superannuation allowance to the surviving spouse shall be paid during the lifetime of the surviving spouse unless the member, after the date of his or her marriage, nominated a person other than his or her spouse to receive as a refund the amount of the credit to the member. Similarly, the Pension (College) Act as well as the Pension (Municipal) Act, and the Pension (Teachers) Act all provide that a contributor may make a nomination of a payee of a refund of some other person other than his or her spouse after the date of the contributor's latest marriage; otherwise the spouse shall be granted an allowance.

Of the Manitoba statutes reviewed, An Act to Provide for the Superannuation of Civil Servants is silent as to the timing of a marriage but where a surviving spouse is more than ten years younger than the deceased employee, the amount of the allowance to the surviving spouse

shall be reduced to an annuity that is actuarially equivalent to the value of an annuity calculated for a person who is exactly ten years younger than the deceased employee. Also, an employee before he or she dies, may direct the Board in writing not to pay any annuity to his or her spouse under this section. A similar provision is also found in An Act to Provide Pensions and Disability Allowances for Teachers, S.M. 1980, c. P-20.

The Public Service Superannuation Act for the Province of New Brunswick provides that a surviving spouse is entitled to a pension except that where a contributor dies within one year after marriage, no surviving spouse's pension is payable if the Minister is not satisfied that the contributor was at the time of his or her marriage in such a condition of health as to justify him or her in having an expectation of surviving for at least one year thereafter. The Teachers' Pension Act for New Brunswick also contains a similar provision.

In Saskatchewan, the Municipal Employees' Superannuation Act is also silent as to the timing of a marriage but provides that, where a retired member dies leaving a surviving spouse, one-half of the allowance is paid to the surviving spouse for life; similarly the Teachers' Superannuation Act of Saskatchewan provides that where a superannuate dies leaving a surviving spouse, three-fifths of the allowance shall be paid to the surviving spouse for life.

It would seem that especially in light of Ontario's Legislative Assembly Retirement Allowances Act, for the purposes of section 15(1) of the Charter, Mrs. H is similarly situated but not treated similarly to every other spouse in the province who married a pension contributor after his or her retirement; nor is she treated similarly to other surviving spouses under the TSA. In my view the distinction drawn between surviving spouses who marry a contributor before or after retirement is unfair and unreasonable. Further, Mrs. H is being denied equal benefit of the law, which requires that conditions of entitlement to benefits be prescribed on an equal basis. Additionally, it appears that viable alternatives are in place elsewhere in Canada which would seem to comply with the equality provisions of the Charter and merit consideration.

I have also considered section 1 of the Canadian Charter of Rights and Freedoms as it applies to the impugned legislation.

Section 1 of the Charter states as follows:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The Supreme Court of Canada has set the standard for applying section 1 in R. v. Oakes (1986), 24 C.C.C. (3d) 321. The test for whether a limit on a fundamental right or freedom is a reasonable one, based on a balance of probabilities, is that:

(1) The limit's objective must be of sufficient importance to override the Charter by relating to concerns which are pressing and substantial in a free and democratic society.

(2) The government must then prove that the means chosen to achieve the objective are reasonable and demonstrably justifiable by satisfying three components of a proportionality test:

(a) the measures to achieve the objective must be rationally connected to the objective;

(b) even if rationally connected, the means should impact as little as possible on the freedom in question; and

(c) there must be a proportionality between the effects of the measure responsible for limiting the Charter of Rights and Freedoms and the objective.

Firstly, in determining whether the denial of an allowance to a surviving spouse who marries a contributor after he/she retires is a reasonable limit on the right to be treated equally, I would note that costs to contributors are a primary consideration of all pension plan benefits; however, in my view, the costs of compliance involved in this case do not outweigh the principles of fairness and equality. I would also note, in addition to the unequal treatment of other Ontario public-sector-plan contributors against the contributors to the LARAA, it cannot be demonstrated that cost or administrative convenience constitutes justification under section 1.

In order to address the first part of the court's proportionality test, to learn more of the actuarial implications and to determine the potential cost of granting allowances to surviving spouses who marry after a pension is being received a member of my investigative staff met with Mr. C, Director of Actuarial Services, Ministry of Government Services. Mr. C pointed out that section 45 of the new Pension Benefits Act, 1987, provides that "every pension paid under a pension plan to a former member who has a spouse on the date that the payment of the first instalment of the pension is due shall be a joint and survivor pension." This may assist future pensioners who elect a deferred annuity when single and who subsequently marry before payments are commenced, but it will not assist those in Mrs. H's circumstances.

Mr. C advised that an actuarial assessment looks at whether one is married at the time of retirement; the assumption made is for 90%. Thus, according to Mr. C, the fact that a few more spouses become part of this assessment, by reason of legislative changes concerning remarriage and post-retirement marriages, would probably only put the actual percentage closer to the 90% assumption. Mr. C acknowledged that costs to the plan would be incurred, but that such costs may not be shown in the valuation of the plan.

Concerning the LARAA, he stated that spousal benefits were fairly minor when considering the plan's total cost. He advised that contributions under this plan had in fact increased following the 1984 amendments (from 8% to 10%), but that this was attributable to a higher accrued value and a change to the average annual remuneration period.

Mr. C further noted that, similar to the changes concerning remarriage of a surviving spouse, such change to spousal benefits would incur costs to the plan (and ultimately its members), but actuarial assumptions or valuations would not necessarily be altered. He did feel however, that spousal benefits potentially could be more expensive than the remarriage provisions, citing the "worst-case scenarios" of death-bed marriages and those with a great disparity in age. I advised the governmental organizations affected by my findings that it seemed to me that this situation may be overcome, for instance, by a provision similar to that of Manitoba's superannuation legislation referred to earlier in this report. Alternatively, a provision could be made which bases the percentage of the survivor allowance on the number of months of the marriage, with a 100% allowance payable where the marriage was at least twelve months in duration.

The second part of the above-mentioned Charter analysis requires that the means chosen, that is prohibiting a spouse's allowance to those who marry after retirement, should impact as little as possible on the right, in this case, to equality without discrimination based on marital status. Although section 32 of the TSA, 1983 provides that a pensioner can elect to provide a survivor allowance to a spouse where marriage takes place after retirement, as previously noted, this section does not apply to contributors who retired before September 1, 1984. I stated that there appears to have been no attempt to alleviate the ongoing discrimination for this latter group of pensioners.

I also noted that a request by a pensioner in accordance with section 32 results in a reduced pension and such direction must be made within 90 days from the date upon which the person became a spouse; otherwise, the Commission must be satisfied that the person making the direction is in good health having regard to the person's age. In accordance with section 32(4) the amount of the allowance payable to the person shall be actuarially reduced to allow for the survivor allowance.

Even though this section was not directly impugned by this investigation, I felt that I could not leave it without comment. I outlined that my review of other provincial public-sector plans revealed provisions which similarly require the pensioner's written direction and the right of the governing agency to satisfy itself as to the person's state of health. However, no other such plans provide for an actuarial reduction to a vested pension entitlement, and in my view such a provision is equally discriminatory. As stated in my letter to the governmental organization affected by my findings, neither a contributor nor the employer pays a greater amount into a plan based on marital status, and therefore I saw no reason, actuarial or otherwise, why a vested pension entitlement should be so reduced. I advised that in my view this constitutes a substantial impact on the right to equality without discrimination.

Finally, the third part of the Charter analysis examines the proportionality between the effects of such a prohibition and legislative objectives. Given the 1984 amendments to the LARAA and the government's desire not to penalize surviving spouses who remarry, the continuance of such a bar to entitlement when contributors remarry after retirement is outweighed under the scrutiny of the Charter.

It would seem that the issue for the public-sector plans is cost. It did not appear, however, from the information obtained during this investigation and from Mr. C, concerning the experience of the LARAA, that actuarial assumptions would require substantial alteration. Thus, the implications of allowing the spouse's allowance to those who marry after retirement may not be as difficult to assess as the Pension Commission has stated.

All of this information was contained in my February 26, 1988 letter to the Teachers' Superannuation Commission, Minister of Education, Attorney General, Pension Commission of Ontario and the Public Sector Pensions Advisory Board advising them of my possible conclusion and recommendations. On April 8, 1988, I received a response from the Chairman of the Teachers' Superannuation Commission. He advised that the Commission had considered my letter at its meeting of March 25, 1988. The Commission noted that my first possible recommendation required action by the Attorney General and the Minister of Education prior to any consideration by the Commission. Consequently, the Commission decided to forward a copy of my letter to the Minister of Education for consideration.

On April 15, 1988, I received a reply from the Chairman of the Public Sector Pensions Advisory Board. The Chairman stated that my thorough and well-explained examination of the issue of survivor benefits for marriage after retirement was of considerable interest to her; however, she had no comments to make on this issue at this time. She advised that this matter is more directly the concern of the plan sponsor, the Minister of Education. Although it could have implications for other public-sector pension plans, the Pensions Advisory Board would address such an issue only by referral of the Chairman of the Management Board.

An interim response was received from the Chairman of the Pension Commission of Ontario. He advised that the Director of the Secretariat was coordinating a review of the provisions outlined in my letter. On May 17, 1988, the Director and two other representatives of the Pension Commission of Ontario attended at my Office to discuss Mrs. H's case with my senior staff. The formal position of the Commission was received on June 28, 1988.

The Pension Commission expressed its concern that, for a number of reasons, the arguments raised in my letter of February 26, 1988 should not apply to private-sector plans due to the fundamental difficulties inherent in administering pension plans with a "dual survivor" provision.

Secondly, the Pension Commission requested that I make specific reference in my report to the fact that my position does not apply to private pension plans, and in particular does not intend to alter the operation of s. 45 of the Pension Benefits Act, 1987, S.O. 1987, c. 35. The Commission explained that for smaller plans, which normally purchase annuities rather than paying benefits directly out of the pension fund, this "dual survivor" requirement would be unworkable. No insurance company would quote annuity rates if there were a possibility that a new spouse (survivor) could disturb the actuarial assumptions on which the original annuity benefit was calculated. It is the Commission's opinion that s. 45 of the Pensions Benefit Act, 1987 cannot be altered to achieve, on a universal basis, my recommendations with respect to the Teachers' Superannuation Act.

As Ombudsman, I cannot comment on the provisions of any private-sector pension plan, and my conclusions ought not to be interpreted as encompassing private plans. These plans are not within my scrutiny and it is quite possible that private plans are a different matter. Thus, it is not my intention to criticize the application of section 45 of the Pensions Benefit Act, 1987 to private-sector plans.

On May 9, 1988, an interim response was received from the Minister of Education, the Honourable Chris Ward. The Minister advised that he had requested a legal opinion on the matter from the constitutional law section of the Ministry of the Attorney General. By letter dated May 25, 1988, I advised the Minister of Education that I would await his further comments until June 15, 1988 so that I could make my final decision and proceed to report on this matter. No further response has been received.

The Minister of Education did, however, comment on the pension aspects of my position as follows: First, he advised that it is difficult to determine whether members of one defined-benefit pension plan are being treated equally, relative to members of another defined-benefit plan, unless all factors, including contribution rate, benefit formula, the nature of the pension promise itself, etc., are evaluated. He stated that he is not convinced that such a comparison is relevant unless the total compensation package (including salary, vacation, benefits, etc.) is considered. Furthermore, the Minister noted his concern that many employers would view a requirement to ensure that their pension plan provide benefits which are similar to those of any other plan in the province, as onerous and a serious threat to the continuation of their pension plans.

Secondly, the Minister noted that the requirement for a pensioner to actuarially adjust his or her pension when he or she marries after retirement is based on the understanding that the plan is allowing a pensioner to change the condition of the original arrangement. The teachers' pension plan is an employment-related pension plan, i.e. the benefit earned is accrued during the member's active membership in the plan, and there is a promise to pay a specified benefit at retirement. The pension which commences at retirement is subject to the terms of the agreement under which the payments commenced. The guarantee attached to those payments is set out at the time of retirement.

Thirdly, the Minister noted that the teachers' plan provides an opportunity for members wishing to enhance the minimum guarantee provisions under the Act, by taking an actuarial reduction in pension. For example, a member may elect to ensure that his or her spouse receive a 75% survivor benefit; however, in order to do so, the pension paid to the member must be actuarially reduced to reflect the cost of the additional benefit. Similarly, the plan allows a member who marries after retirement to provide a benefit guarantee beyond the minimum terms of the Act by actuarially reducing the pension in pay. Unless individuals are required to assume the cost associated with their individual benefit enhancement, the membership at large would in fact be subsidizing the cost of these additional benefits. The Minister concludes that it is hard to argue that this would be fair.

In considering the Minister's first comment, it is my position that even within each pension plan, with the exception of the plan provided under the Legislative Assembly Retirement Allowances Act, members' surviving spouses are not being similarly treated although similarly situated. Mrs. H was married to her husband for over three years before he died. For another couple married for a similar length of time before death of the pensioner intervened, a survivor allowance would be paid by the Commission, where the marriage occurred before the pensioner's retirement, even if by only one day!

As to the Minister's concerns that comparison of pension plans is irrelevant without considering the total compensation package, I would note that my concerns are limited to the plan administered by the Teachers' Superannuation Commission, although I am aware of the implications which my conclusions and recommendations create for other public-sector plans. I would also note that in accordance with section 32(1)(d), the scope of the Charter extends to the legislature and government of each province in respect of all matters within the authority of the legislature of each province. As previously stated, I cannot comment on any provisions of private plans.

The Minister's second basis of concern is for the apparent change to the condition set out in the agreement under which payments commenced. He notes that the guarantee attached to those payments is established at the time of retirement. I would note that although the teachers' plan is an employment-related pension plan, in that the benefit earned is accrued during the members' active membership in the plan, a member contributes no more or less depending on his or her marital status during those years. Even if the plan were to contribute less based on a member's single status, it would be required to pay a survivor allowance if the member married only one day before retirement, even though the plan may not have estimated for this future benefit. Additionally, it is interesting to note that Mr. H was married at the time of his retirement, albeit not to our complainant. Thus, although his spouse as of his retirement was guaranteed a benefit, his subsequent spouse, who is, quite significantly, of the same age, is not similarly treated.

The prohibition of continuing benefits to surviving spouses who remarry has been eliminated, in keeping with the philosophy that a couple

share in the assets and liabilities that were accumulated during their marriage. It seems inconsistent to me to eliminate benefits payable to a surviving spouse who married the pensioner after retirement.

Finally, the Minister makes reference to section 32 of the Teachers' Superannuation Act, 1983 to argue that unless individual members are required to assume the costs associated with their individual benefit enhancements, the membership at large would in fact be subsidizing the cost of these additional benefits.

Firstly, it must be remembered that pension costs are based on actuarial assumptions of the membership group by age and length of service in order to determine the probabilities of retirement, death or termination. To include the cost factors of post-retirement marriage on an actuarial basis (as was done with remarriage), may result in putting the actual figure closer to the assumed figure, but it is unlikely that this would impact greatly in the plan's valuation.

Additionally, it ought to be remembered that the plan is often enhanced by factors outside of the assumptions; for example, when a dependent child does not seek post-secondary education for which a benefit has been assumed, or where a spouse dies before a pensioner, contrary to the actuarial assumption based on the age and sex of the spouse.

On June 17, 1988 a response was received from the Attorney General, the Honourable Ian Scott. It is his view that the denial of benefits to after-married spouses does not contravene section 15 of the Charter as constituting discrimination on the basis of marital status. In his view marital status refers to the individual's status: single, married, divorced or in a conjugal relationship outside of marriage. The Attorney General states that the provision in the Teachers' Superannuation Act does not make a distinction on the basis of any particular marital status. The only restriction set out in this particular provision relates to the timing of the marriage, not the nature of the marital relationship per se.

In my respectful opinion, it is precisely Mrs. H's status as a spouse which has been denied for the purposes of the Teachers' Superannuation Act. Although she was married to Mr. H and is in fact his surviving spouse, she is being treated differently; that is, she has been discriminated against simply due to the timing of their marriage. In my view this limitation violates section 15 of the Charter.

Section 15 has introduced a restriction on the Legislature not to enact legislation which effectively denies individuals the right to equal benefit of the law without discrimination. As I have previously discussed in this report, a successful complaint of discrimination is not dependent upon proof of a violation of the grounds specified in the Charter. Therefore, if the non-enumerated ground of marital status per se presents a problem for the Attorney General, in my view the matter should not fail on this basis, and I am prepared to find that Mrs. H was discriminated against on the basis of the timing of her marriage.

The Attorney General agrees that this issue is an important matter of pension policy, but is an area not within his Ministry's jurisdiction. He therefore advised that my letter of February 26, 1988 as well as a copy of his response was forwarded to the Ministers of Education, Treasury, and Financial Institutions.

Although I have carefully considered the views expressed by these governmental organizations, I remain convinced that Mrs. H has been discriminated against by the application of section 36(2) of the Teachers' Superannuation Act, to deny her a dependant's allowance. In my view, surviving spouses' benefits should be available regardless of the date of the marriage. If these provisions of the teachers' plan were tested in a court of competent jurisdiction, I believe they would fail. However, after weighing all of the submissions received, I have decided to make an additional conclusion and recommendations with respect to the provisions of the teachers' plan which deny a dependant or survivor's allowance to those who marry after the retirement of the member. I do so in order to voice my objections to this type of legislation in the clearest possible terms. It is especially disconcerting to me that the Legislative Assembly eliminated such a restriction for its own members in 1984 (deemed in force July 12, 1977), yet all other public-sector pension plans have been allowed to perpetuate a distinction based on post-retirement marriages.

After considering all of the information gathered during the course of our investigation into Mrs. H's complaint, I have determined pursuant to section 22(1)(a) and (b) of the Ombudsman Act:

(1) that the decision of the Teachers' Superannuation Commission to deny a survivor allowance to Mrs. H because she was not married to Mr. H at the time of his retirement, pursuant to section 36(2) of the Teachers' Superannuation Act, R.S.O. 1980, c. 494 appears to be contrary to law, specifically the Charter of Rights and Freedoms, section 15(1). Similarly, section 26(3) of the Teachers' Superannuation Act, 1983, S.O. 1983, c. 84 appears to be contrary to law, specifically the Charter of Rights and Freedoms, section 15(1);

(2) that the decision of the Teachers' Superannuation Commission to deny a survivor allowance to Mrs. H was in accordance with a provision of the Teachers' Superannuation Act that is improperly discriminatory.

In accordance with s. 22(3)(g) and (e) of the Ombudsman Act, it is my recommendation that:

(1) the Attorney General, in conjunction with the Minister of Education, take appropriate steps to amend the Teachers' Superannuation Act, R.S.O. 1980, c. 494 and the Teachers' Superannuation Act, 1983, c. 84 to be in compliance with section 15(1) of the Charter of Rights and Freedoms, effective April 17, 1985;

(2) following these amendments, the Teachers' Superannuation Commission take the necessary steps to issue a dependant's allowance to Mrs. H in accordance with section 36(1) of the Teachers' Superannuation

Act, R.S.O. 1980, c. 494, effective from the first day of the month following the date of her inquiry for same.

I am mindful of the fact that if my second conclusion alone is accepted, the Teachers' Superannuation Commission would find itself in a difficult position vis-a-vis its own legislation. Therefore, I am making the following recommendations to assist the Commission, Mrs. H and those who find themselves similarly aggrieved by the offending provisions:

(3) the Attorney General, in conjunction with the Minister of Education, take appropriate steps to amend the Teachers' Superannuation Act, R.S.O. 1980, c. 494 and the Teachers' Superannuation Act, 1983, c. 84 to remove the provision which I have found to be improperly discriminatory.

(4) the Minister of Education, in conjunction with any other governmental organization he deems necessary, issue an ex gratia payment to Mrs. H as soon as possible, effective from the first day of the month following the date of her inquiry for same, until the amended provision is in force. Such a payment can be made by providing for it through the annual budgetary process, so that no question will arise as to the authority of the Ministry to make the payments. Also, I recommend that payments be made to any other surviving spouses who have been denied a full dependant or survivor allowance by the Teachers' Superannuation Commission pursuant to the Teachers' Superannuation Act or the Teachers' Superannuation Act, 1983, payable from the first day of the month following the date of their request for a benefit as a result of my recommendation.

My final conclusions and recommendations were reported to the Teachers' Superannuation Commission, the Minister of Education, Attorney General, Pension Commission of Ontario and the Public Service Pensions Advisory Board on July 7, 1988. On July 15, 1988 I received a response from the Director of the Teachers' Superannuation Commission.

He advised that the Commission is of the opinion that the legislation determines who is eligible for the survivor benefit in this case. He noted that should the legislation be amended, the Commission shall implement the amended version as quickly and as fully as possible. While no question exists as to the identity and whereabouts of the appellant in this case, other survivors may have been denied consistent with the legislation. Such denials may have involved simply a telephone call from the potential survivor, requesting information regarding the current Act. Such a call may not have been recorded. The Director noted that my recommendation that "payments be made to any other surviving spouses who have been denied a full dependent or survivor allowance", if implemented, may be limited to those who step forward in response to advertisements in the appropriate media.

In conclusion, the Director noted that, lacking legislative authority or a determinative role in amending legislation, the Commission

will await the outcome of the actions and direction of the Attorney General, Minister of Education and the Ontario Legislature.

On July 18, 1988 representatives of the Ministry of Education requested to meet with my senior staff to discuss this matter. They agreed to further canvass the pertinent issues and respond in writing by my requested date of July 22, 1988 so that if necessary, the case might be considered by the Standing Committee when it next convened during the week of August 8, 1988.

To the time of printing, I had received no further responses from the governmental organizations who were apprised of this investigation. Pursuant to the discretion given to me under section 22(4) and (5) of the Ombudsman Act, I referred the matter to the Premier on July 25, 1988. Mrs. H was also advised of the results of my investigation and the file was closed.

REPORT OF THE OMBUDSMAN'S OPINION,

REASONS THEREFOR AND RECOMMENDATION

FOLLOWING HIS INVESTIGATION INTO THE COMPLAINT OF

MRS. J

Mrs. J registered her complaint against the Ministry of Health/OHIP in September, 1986. It was Mrs. J's contention that the Ministry's refusal to assist her with the cost of donor sperm, was unreasonable.

On January 16, 1987, the former Deputy Minister of Health, Dr. Allan Dyer, was advised of the Ombudsman's intention to investigate Mrs. J's concerns. He was also invited to provide this Office with a statement of the Ministry's position with respect thereto.

On March 3, 1987, we received a response from Dr. Dyer that there is no provision under the Health Insurance Act or any program within the Ministry of Health to cover the cost of donor sperm. Furthermore, Dr. Dyer advised that it was not anticipated that the cost of donor sperm would be included as an insured benefit by the Ministry of Health.

During the course of this investigation, legal research including a review of the Health Insurance Act was conducted. In addition, several discussions took place between my investigator and officials from both the Ministry of Health and OHIP as well as with various private physicians.

Mr. and Mrs. J have one son, John, 4 years old, who suffers from Zellweger's Syndrome, an extremely rare, autosomal, recessively inherited disorder. It is estimated that there may be two or three babies per year in Ontario suffering from this disorder and the general incidence in the population may possibly be one in 35,000 births. Infants with this condition have a life expectancy of only 1-2 months. Mr. and Mrs. J's son is exceptional in having survived this long.

Mr. and Mrs. J's son's condition is progressively debilitating. He is now functionally blind, suffers from an enlarged liver and spleen, and has developed spasticity and abnormal reflexes (he is no longer able to sit unassisted). He is mobile but not ambulatory and he suffers from seizures which must be controlled by medication. John also has club feet and is mentally retarded. He has required hospitalization quite frequently due to seizures, haemorrhaging and pneumonia. Mr. and Mrs. J's physician has advised them that John will likely soon be deaf and will not live to see his teens.

Mr. and Mrs. J wish to have another child. However, they have been advised that because they both carry a recessive gene, there is at

least a one-in-four chance that, should they conceive together, their next child will also be born with Zellweger's Syndrome. Given the statistics, Mr. and Mrs. J feel that in order to have another child, Mrs. J should be impregnated by donor sperm. Mr. and Mrs. J have considered other options, such as adoption, monitored pregnancy/ therapeutic abortion, and non-monitored pregnancy, but have rejected these options either on moral grounds, or, in the case of adoption, on the lengthy process in time involved. Since Mr. J is the sole income earner, Mrs. J wrote to the District Medical Consultant, requesting that the Ministry of Health/OHIP assist her with the cost of donor sperm. Mrs. J was subsequently advised by the local Assessment Officer of OHIP that the cost of semen samples is not a benefit under OHIP. Mrs. J then approached my Office. She contended that the Ministry of Health's refusal to assist her with the cost of donor sperm was unreasonable in light of her and her husband's special circumstances, including:

1. the risk they face of the disorder re-appearing should they conceive together;

2. the lack, in present social and technological circumstances, of suitable alternative avenues to address their goal of having another child.

After conducting a careful review of the facts and legislation pertaining to Mrs. J's complaint, I wrote to Dr. Martin Barkin, Deputy Minister, on March 25, 1988, and in accordance with Section 19(3) of the Ombudsman Act, advised him of my tentative conclusion and recommendation with respect to Mrs. J's concerns.

On the basis of the foregoing, I tentatively concluded, pursuant to Section 22(1)(b) that the Ministry of Health's refusal to assist Mr. and Mrs. J with the cost of donor sperm is in accordance with legislation, that is the Schedule of Benefits enacted pursuant to the Health Insurance Act, which may be unreasonable.

In support of this, I noted that since the procedure relating to artificial insemination is considered an insured service, sperm, whether it be from the husband or from a donor, is part of the procedure, and therefore, any cost relating to sperm should be covered by the Ministry of Health/OHIP.

I tentatively recommended pursuant to Section 22(3)(d) that the Ministry of Health/OHIP amend the Schedule of Benefits to include the cost of donor sperm as part of the artificial insemination procedure currently covered under the Schedule of Benefits.

Before reaching a final conclusion on this case, I have carefully considered the representations made by Dr. Barkin in his letter of June 14, 1988. Dr. Barkin reiterates Dr. Dyer's statement in his letter of March 3, 1987, that there is no provision for the Ministry of Health to cover the cost of donor sperm and that this cost will not be included as an insured benefit by the Ministry.

I do not accept the position taken by Dr. Barkin of the Ministry of Health. Accordingly, I have determined pursuant to Section 22(1)(b) that the Ministry of Health's refusal to assist Mr. and Mrs. J with the cost of donor sperm is in accordance with legislation, the Schedule of Benefits enacted pursuant to the Health Insurance Act, which may be unreasonable.

Consequently, it is my recommendation pursuant to Section 22(3)(e) of the Ombudsman Act that the Ministry of Health/OHIP reconsider the Schedule of Benefits to include the cost of donor sperm as part of the artificial insemination procedure currently covered under the Schedule of Benefits.

I gave the Ministry until July 22, 1988 to respond to my recommendations. As of publication of this special report, no response has been received.